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No. 04-340

In the Supreme Court of the United States

SAN REMO HOTEL L.P., THOMAS FIELD, ROBERT FIELD, AND T&R INVESTMENT CORP.,
Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT OF CITY PLANNING, CITY PLANNING COMMISSION, BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The City and County of San Francisco adopted an ordinance that prohibited hotels from continuing their historic, duly-licensed operation as hotels, but allowed hotel owners to avoid those restrictions by paying an exaction. Petitioners brought this action challenging the exaction based on the Takings Clause of the Fifth Amendment and 42 U.S.C. § 1983. The United States Court of Appeals for the Ninth Circuit initially refused to reach the merits of the constitutional challenge, finding that petitioners were required to ripen their claim by seeking compensation in state court under *Williamson County Planning Commission v. Hamilton Bank of Johnson City*. Once the claim was ripe, the Ninth Circuit again refused to reach the merits of the constitutional challenge, finding that the claim was barred by issue preclusion. This Court granted the petition for certiorari limited to the following question:

Is a Fifth Amendment Takings claim barred by issue preclusion based on a judgment denying compensation solely under state law, which was rendered in a state court proceeding that was required to ripen the federal Takings claim?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners incorporate the disclosure statement in the Petition for Certiorari.

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Breemer, J. David, *Overcoming Williamson County's Troubling State Procedures Rule*, 18 J. Land Use & Envtl. L. 209 (2003) 16

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OPINIONS BELOW

The order of the United States Court of Appeals for the Ninth Circuit denying the petition for rehearing en banc is unreported and is reproduced as Petition Appendix ("Pet. App.") A. The opinion of the Ninth Circuit is reported as *San Remo Hotel, L.P. v. City and County of San Francisco*, 364 F.3d 1088 (9th Cir. 2004), and is reproduced as Pet. App. B. The orders of the United States District Court for the Northern District of California are unreported and reproduced as Pet. App. C and Pet. App. D. The opinion of the California Supreme Court is reported as *San Remo Hotel v. City and County of San Francisco*, 27 Cal.4th 643, 41 P.3d 87, 117 Cal.Rptr.2d 269 (2002), and is reproduced as Pet. App. E.

JURISDICTION

The opinion of the Ninth Circuit was filed and entered on April 14, 2004. Pet. App. B. The order of the Ninth Circuit denying the petition for rehearing en banc was entered on June 9, 2004. Pet. App. A. The petition for writ of certiorari was timely filed under Rule 13.1 of the Rules of the Supreme Court on September 7, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides, in pertinent part, that "private property [shall not] be taken for public use, without just compensation."

The Residential Hotel Unit Conversion and Demolition Ordinance adopted by the City and County of San Francisco,

as codified at Chapter 41 of the San Francisco Administrative Code, is reproduced as Pet. App. F.

STATEMENT OF THE CASE

A. Statement of Facts[1]

Petitioners San Remo Hotel, L.P., Thomas Field, Robert Field and T&R Investment Corp. (the "Field Brothers") own the San Remo Hotel. J.A. 70-71. The hotel was built in 1906 and has been operated as a tourist hotel since the 1950s. J.A. 71. The Field Brothers bought the San Remo Hotel in 1970 when it was fully-licensed as a tourist hotel. J.A. 71-72. After the Field Brothers restored the building in 1976, the City issued new permits and licenses that authorized unlimited tourist use of the hotel. J.A. 72. Since then, the City has collected hotel taxes based on the tourist use of the hotel. J.A. 72, 76.

The City adopted the first version of the Residential Hotel Unit Conversion and Demolition Ordinance ("HCO" or "Hotel Ordinance") in 1981, despite the City Attorney's advice that it was unconstitutional. J.A. 73. Under the Hotel Ordinance, rooms were designated as residential units based on their use during a particular 32-day period: from August 22 to September 23, 1979. HCO § 41.4(n) and (q), Pet. App. 202a, 203a. Thus, a room was designated as a residential unit

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[1] This case was decided on a motion to dismiss under Fed.R.Civ.P. 12(b)(6); therefore, all of the facts alleged in the complaint must be accepted as true. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993). This statement of facts is based on the Third Amended Complaint, which is reproduced in the Joint Appendix ("J.A.") at 69-95.

if it was occupied by the same person during those 32 days in 1979, even if the room had never before been rented to a residential tenant. J.A. 78.

The consequence of being designated a residential unit was that the room could only be rented to tourists on a daily basis during the tourist season from May 1 to September 30. J.A. 73-74. During the rest of the year, only weekly or monthly rentals were allowed. J.A. 73. The Hotel Ordinance allowed hotel owners to obtain a permit to rent the residential units to tourists year-round. J.A. 74. But, that permit would be subject to a condition requiring the payment of a replacement housing fee or the creation of new residential units at another location either by construction of new units or rehabilitation of unusable units. J.A. 74. The replacement housing fee was set at 40% of the cost of constructing replacement housing plus the site acquisition cost. J.A. 74.

The San Remo Hotel's 62 rooms were mistakenly designated as residential units even though there were only 10 residential tenants. J.A. 78-79. Nevertheless, the San Remo Hotel (like many hotels) was able to continue its historical use as a primarily tourist hotel. J.A. 79. As allowed by the Hotel Ordinance, the Field Brothers rented the rooms to tourists during the tourist season, did not rent rooms on a daily basis during the rest of the year when there was little or no tourist business, and kept about 10 residential tenants year-round. J.A. 73-74, 78-79.

In 1990, the City adopted a new version of the Hotel Ordinance that severely restricted the Field Brothers' operation of the hotel. J.A. 77. The new ordinance reduced the allowed daily rental to tourists during the tourist season from 100% to 25% of the designated residential units; prohibited even that 25% tourist use unless the rooms were

rented to residents during the rest of the year (thereby subjecting those rooms to San Francisco's rent control ordinance, which severely restricts evictions); and doubled the replacement housing fee imposed on permits to escape the Hotel Ordinance's use restrictions. J.A. 77; HCO §§ 41.13(a)(4), 41.19(a)(3), Pet. App. 227a, 236a-237a. Moreover, the 1990 version of the Hotel Ordinance explicitly states that the City doubled the replacement housing fee from 40% to 80% of the cost of constructing new housing because adequate public funding was no longer available. J.A. 77-78; HCO § 41.3(m), Pet. App. 198a.

The 1990 Hotel Ordinance had an enormous impact on the San Remo Hotel because it eliminated the Field Brothers' right to continue the historical use of their hotel. J.A. 79. As a result, they immediately applied for a permit to escape the new restrictions. J.A. 80. The Field Brothers then participated in three years of administrative proceedings before the City's Zoning Administrator, Board of Permit Appeals, and Planning Commission. J.A. 80-83. The Planning Commission did grant a permit for the San Remo Hotel, but imposed a condition: The Field Brothers were required to pay the City an exaction of $567,000 under the Hotel Ordinance. J.A. 83. The Field Brothers appealed that decision to the Board of Supervisors, which affirmed the Planning Commission's decision by a 6-5 vote. J.A. 84. A dissenting Supervisor called the City's exaction "organized extortion." J.A. 84.

B. Procedural History

In 1993, the Field Brothers brought this federal court action to challenge the exaction imposed by the City. J.A. 1. The district court issued a preliminary injunction, finding that the Hotel Ordinance was facially unconstitutional. J.A. 7.

Three years later, the district court granted the City's motion for summary judgment and dissolved the preliminary injunction. J.A. 24. The district court found that the as-applied takings claims were unripe and that the facial takings claims were barred by the statute of limitations. J.A. 24; *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1100 (9th Cir. 1998) ("*San Remo I*").

Two years later, the Ninth Circuit affirmed the district court's ruling that the as-applied takings claims were unripe because the Field Brothers had not sought compensation in the state courts as required by *Williamson County Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). *San Remo I*, 145 F.3d at 1102. The Ninth Circuit directed the district court to stay the facial takings claims based on the substantial advancement test under *Pullman* abstention. *San Remo I*, 145 F.3d at 1101-1102.

Two years later, the California Court of Appeal reversed the state trial court's order sustaining the City's demurrer to the state law compensation claims, finding that heightened scrutiny applies to the exaction even though it was imposed by legislation. *San Remo Hotel v. City and County of San Francisco*, 100 Cal.Rptr.2d 1, 9-11 (2000). The state court of appeal also reversed the trial court's order denying the petition for writ of administrative mandate, which challenged the administrative determination that a conditional use permit was required for tourist use of the San Remo Hotel. *Id.* at 16-18.

Two years later, the California Supreme Court reversed the state court of appeal in a 4-3 decision. *San Remo Hotel v. City and County of San Francisco*, 27 Cal.4th 643 (2002) ("*San Remo II*"), Pet. App. 106a-194a. The state supreme court rejected the Field Brothers' state law claims for

compensation, finding that the trial court had properly sustained the City's demurrer to the complaint because it failed to state facts sufficient to constitute a cause of action. *San Remo II*, Pet. App. 144a-155a. In particular, that court found that under the state constitution, there is no heightened scrutiny for exactions imposed by legislation. *San Remo II*, Pet. App. 130a-144a. The state supreme court also affirmed the trial court's denial of the petition for writ of administrative mandate on the grounds that a conditional use permit was required even if only some of the 62 hotel rooms had been in residential use. *San Remo II*, Pet. App. 122a-130a. All seven justices agreed that the state court had not decided any federal question because the Field Brothers "explicitly" reserved their federal claims for determination by the federal courts. *San Remo II*, Pet. App. 107a, n.1, 170a, 194a.

One year later, the district court granted the City's motion to dismiss the federal court complaint under Fed.R.Civ.P. 12(b)(6). The district court found that the Field Brothers' federal takings claims were barred by issue preclusion, based on the state supreme court decision, and the statute of limitations. Pet. App. 50a-51a, 85a, 73a, 90a. In deciding that the takings claims were barred by issue preclusion, the district court rejected the following arguments against issue preclusion: (1) the state court proceedings were required to ripen the takings claims under *Williamson County*, (2) the state court proceedings resulted from *Pullman* abstention, and (3) under California law, the judgment should not be given preclusive effect. Pet. App. 37a-51a, 85a-100a

Finally, eleven years after this action was filed, the Ninth Circuit affirmed the district court solely on the ground that the Field Brothers' claims were barred by issue preclusion and did not reach the statute of limitations issue. *San Remo Hotel v. City and County of San Francisco*, 364 F.3d 1088 (9th Cir. 2004) (*"San Remo III"*), Pet. App. 12a-21a, 11a. The Ninth Circuit held that issue preclusion can bar federal takings claims even though the state court proceedings were required to ripen those claims. *San Remo III*, Pet. App. 12a-16a. The Ninth Circuit held that the claims were barred by issue preclusion because "the determination of the state takings claims was 'an equivalent determination' of the federal takings claims." *San Remo III*, Pet. App. 17a, citing *Dodd v. Hood River County*, 59 F.3d 852, 863 (9th Cir. 1995) (*"Dodd I"*). The Ninth Circuit denied the Field Brothers' petition for rehearing en banc, with no judge requesting a vote on the petition. Pet. App. 2a.

SUMMARY OF ARGUMENT

Most takings cases never make it through the procedural hurdles this Court established in *Williamson County* to ripen a federal takings claim. Indeed, 20 years after this Court's decision in *Williamson County*, the Field Brothers are among the few plaintiffs who have met this Court's requirements for a federal court to hear a takings case. The Field Brothers' gauntlet began in 1990 with administrative proceedings and ended in 2002 with the California Supreme Court's denial of their state compensation claims.

Despite the Field Brothers' extraordinary path to this Court, they have never asked for anything more than what was promised by this Court's opinion in *Williamson County*: They asked the lower federal courts, and now ask this Court, only that a federal court hear the merits of the federal takings claims that they filed in federal court in 1993.

In this case, there is no doctrinal or public-policy barrier to that result. The purpose of the *Williamson County* requirement that takings plaintiffs first go to state courts was

not to bar takings claims from the federal courts. Its purpose was to give the state courts a chance to provide just compensation *before* the federal courts considered the federal constitutional claim. Once the state courts refuse to provide compensation, the duty of the federal courts is clear: decide the federal constitutional claim on the merits.

That was the duty of the lower courts in this case. The Field Brothers undeniably met this Court's ripeness requirements for a federal determination of their takings challenge. Hence, the district court was required to hear their challenge and the Ninth Circuit was required to assure that the district court do so.

Instead, the lower courts defied their duty to hear the claim, finding that -- because the California courts rejected the Field Brothers' claims under state law -- the federal courts need not consider the federal takings claims on their merits. The lower courts were wrong for two independent reasons:

First, because the state court proceedings were required to ripen the federal takings claim under *Williamson County*, the federal courts were required to disregard the decision of the state court. Indeed, the state court did not even consider the federal constitutional claim, much less rule on it. The Field Brothers' narrow loss of their state claims in state court should hardly defeat the federal claims that were, at last, ripened by that loss.

That was the holding of the Second Circuit, which concluded that state court proceedings required to ripen federal takings claims should be given no preclusive effect:

> It would be both ironic and unfair if the very procedure that the Supreme Court required [takings plaintiffs] to follow before bringing a Fifth Amendment takings claim – a state court-inverse condemnation action – also precluded [them] from ever bringing a Fifth Amendment takings claim.

Santini v. Connecticut Hazardous Waste Management Service, 342 F.3d 118, 130 (2003). The Second Circuit recognized that the purpose of the *Williamson County* ripeness doctrine and the *Pullman* abstention doctrine is to postpone federal court decision of a federal constitutional issue until the state courts have decided state law issues that would moot the federal constitutional issue. *Santini*, 342 F.3d at 129-130. That purpose is hardly served by the Ninth Circuit's conclusion that the federal courts' decision is not merely postponed, but abdicated entirely.

Second, even if issue preclusion applies to some takings cases, the Ninth Circuit's decision to apply it in this case was still wrong. The Ninth Circuit's rule requires the application of the state law of issue preclusion. But, while the Ninth Circuit mentioned California law of issue preclusion, it did not apply that state's law. The Ninth Circuit applied the "equivalent determination" test announced in *Dodd I*, which was a statement of Oregon law. The Ninth Circuit's application of the Oregon test to determine whether to give preclusive effect to this California judgment was wrong.

In sum, this Court made the work of plaintiffs seeking a federal forum for their takings claims enormously difficult. But, that work was diligently done by the Field Brothers. The Ninth Circuit refused to reward their efforts by reaching the merits of the Field Brothers' federal takings claims. Under this Court's *Williamson County* decision, no state preclusion law is relevant. And, even if the Second Circuit were wrong and state issue-preclusion rules do apply, the Ninth Circuit

was required to consult the right state's laws. Under California law, as under *Williamson County*, the federal courts are required to decide the Field Brothers' federal takings claims on the merits.

I. THIS COURT'S DECISION IN *WILLIAMSON COUNTY* WAS NOT INTENDED TO BAR TAKINGS CLAIMS FROM THE FEDERAL COURTS

The Field Brothers spent 12 years, beginning with proceedings before the City's administrative agencies in 1990 and ending with the California Supreme Court's denial of compensation in 2002, to satisfy both prongs of *Williamson County*'s ripeness requirement. The Field Brothers understandably believed that those procedural steps were required to ripen their federal takings claims, and would not extinguish their claims. Ultimately, as a result of the Field Brothers' efforts to satisfy both prongs of the ripeness test, their case has "passed through procedural purgatory and wended its way to procedural hell." *Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 284 (4th Cir. 1998).

Even the most careful reading of this Court's opinion in *Williamson County* gives no indication of the procedural quagmire it would spawn in the hands of the lower courts. The opinion does not even suggest that the ripening of takings claims will extinguish them. Instead, this Court expressly stated two possible results when takings plaintiffs seek compensation in the state courts: (1) the state courts could award compensation and moot the federal constitutional claim; or (2) the state courts could deny compensation and ripen the federal takings claim. *Williamson County*, 473 U.S. at 194-195. In short, as this Court stated clearly and repeatedly, takings plaintiffs may ripen their federal takings claims and

then pursue them in federal court:

> [W]e conclude that respondent's claim is premature.
>
> . . . . .
>
> Because respondent has not yet . . . utilized the procedures Tennessee provides for obtaining just compensation, respondent's claim is not ripe.
>
> . . . . .
>
> A second reason the taking claim is not yet ripe is that respondent did not seek compensation through the procedures the State has provided for doing so.
>
> . . . . .
>
> [T]he property owner cannot claim a violation of the Just Compensation Clause until it has used the [state] procedure and been denied just compensation.
>
> . . . . .
>
> [U]ntil [respondent] has utilized that [state] procedure, its taking claim is premature.
>
> . . . . .
>
> In sum, respondent's claim is premature, . . .

Williamson County, 473 U.S. at 185, 186, 194-195, 197, 200.

The Court's rationale for requiring takings plaintiffs to seek compensation using state procedures was clear:

> The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action.

Williamson County, 473 U.S. at 194 n. 13. That rationale is based on the fundamental purpose of the Fifth Amendment:

> The basic understanding of the Amendment makes clear that it is designed not to limit the governmental

> interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.

First English Evangelical Lutheran Church v. Los Angeles, 482 U.S. 304, 315 (1987).

Nothing in the *Williamson County* opinion even suggests that the outcome of state compensation procedures could preclude a federal takings claim. Indeed, as the Second Circuit concluded, that result would be inconsistent with this Court's opinion in *Williamson County*. *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118, 127-130 (2003). The same reasons that compelled this Court to create an exception to issue preclusion rules for state court proceedings required by *Pullman* abstention also compelled the Second Circuit's decision. *Santini*, 342 F.3d at 128-129, discussing *England v. Louisiana State Board of medical Examiners*, 375 U.S. 411 (1964). The Second Circuit explained that:

> It would be both ironic and unfair if the very procedure that the Supreme Court required [takings plaintiffs] to follow before bringing a Fifth Amendment takings claim - a state court-inverse condemnation action - also precluded [them] from ever bringing a Fifth Amendment takings claim.

Santini, 342 F.3d at 130; see also *Allen v. McCurry*, 449 U.S. 90, 101 n. 17 (1980), citing *England*, 375 U.S. at 416 and n. 7 (*Pullman* abstention serves "only to postpone rather than to abdicate jurisdiction, since its purpose is to determine whether resolution of the federal question is even necessary").

As the Second Circuit concluded, any procedural difference between the *Williamson County* ripeness doctrine and the *Pullman* abstention doctrine "is not a meaningful one." *Santini*, 342 F.3d at 129. The Second Circuit emphasized:

> "There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims."

Santini, 342 F.3d at 128, quoting *England*, 375 U.S. at 415.

The Second Circuit refused to apply issue preclusion because it would create a "Catch-22 for takings plaintiffs": under *Williamson County*, they are required to seek compensation in state court to make the federal takings claims ripe, but once the federal takings claims are ripe, they would be defeated by the preclusive effect of the state court judgment. *Santini*, 342 F.3d at 127. As the Second Circuit explained, "[w]e do not believe that the Supreme Court intended in *Williamson County* to deprive all property owners . . . of the opportunity to bring Fifth Amendment takings claims in federal court." *Santini*, 342 F.3d at 130.

In resolving cases under *Williamson County* ripeness rules, like *Pullman* abstention cases, the federal courts must preserve "the primacy of the federal judiciary in deciding questions of federal law." *England*, 375 U.S. at 415-416. Indeed, the primacy of the federal judiciary is even more compelling under *Williamson County*. While *Williamson County*'s ripeness requirement is mandated by the Fifth Amendment, *Pullman* abstention is merely a "judge-fashioned

vehicle" that allows the state courts to decide state law issues first and thereby potentially avoid the adjudication of federal constitutional issues. *England*, 375 U.S. at 415; *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 500-501 (1941) (abstention is based on sound discretion of court of equity).

In sum, the Ninth Circuit's decision was not caused by any ambiguity in the *Williamson County* decision itself. *DLX, Inc. v. Kentucky*, 381 F.3d 511, 523 n. 9 (6th Cir. 2004) (the Ninth's Circuit's rule is "a result clearly not contemplated by the Court in *Williamson County*"); See also *Wilkinson v. Pitkin County Bd. of County Commissioners*, 142 F.3d 1319, 1325 n. 4 (10th Cir. 1998) ("It is difficult to reconcile the ripeness requirement of *Williamson* with the laws of res judicata and collateral estoppel."). This Court should now make clear to the lower federal courts that federal takings claims are not consigned to the state courts, and must be decided on the merits once the ripeness requirements are satisfied.

II. THE NINTH CIRCUIT'S DECISION CREATES A TRAP THAT PRECLUDES ALL FEDERAL COURTS FROM REVIEWING THE MERITS OF FEDERAL TAKINGS CLAIMS

The practical effect of the Ninth Circuit's rule on issue preclusion, when combined with the ripeness requirement of *Williamson County* is that federal takings claims can never be considered on the merits in any federal court, including this Court.

In this case, for example, the Field Brothers could not have filed a petition for certiorari to review the California Supreme Court decision because that court did not decide any

federal question. *San Remo II*, Pet. App. 107a, n. 1.[2] Indeed, the California courts could not have decided the federal takings claims because those claims are subject to the same ripeness requirements when brought in state court as they are in federal court. *Breneric Associates v. City of Del Mar*, 69 Cal.App.4th 166, 188-189, 81 Cal.Rptr.2d 324, 338-339 (1998) (*Williamson County* ripeness requirement applies in state courts); see also *Santini*, 342 F.3d at 126-127, discussing *Melillo v. City of New Haven*, 249 Conn. 138, 154, 732 A.2d 133, 143 n. 28 (1999) (Connecticut applies same rule as *Breneric*).

The Ninth Circuit's barrier to federal court consideration of Fifth Amendment claims is indefensible. Under the Ninth Circuit's rule, the Fifth Amendment's protection of property rights is relegated to the "status of a poor relation" of the other rights secured by the Bill of Rights. Cf. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

Indeed, one commentator has dubbed this combination of ripeness and issue preclusion, "The *Williamson* Trap".

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[2] All seven justices of the California Supreme Court stated that they expected that the Field Brothers would obtain a ruling on the merits of their federal claims in this federal court action. The majority stated that the Field Brothers "explicitly reserved their federal causes of action" and that because the Field Brothers relied "solely on state law, no federal question has been presented or decided in this case." *San Remo II*, Pet. App. 107a, n. 1. Both dissents made the same point. *San Remo II*, Pet. App. 170a (Baxter and Chin, dissenting: "Plaintiffs have reserved their federal claims and, if rebuffed here, will resume their federal litigation"); Pet. App. 194a (Brown, dissenting: "I dissent and hope the plaintiffs find a more receptive forum in the federal courts.").

Meacham, Madeline J., *The Williamson Trap*, 32 Urb. Law. 239 (2000). Moreover, this is not just a trap for the unwary, it is a "procedural snare that swallows the careful takings claimant as well as the unwary". Breemer, J. David, *Overcoming Williamson County's Troubling State Procedures Rule*, 18 J. Land Use & Envtl. L. 209, 240, 242 (2003) ("following *Williamson County*, many federal courts have converted the state procedures rule into a permanent jurisdictional bar by applying state rules of claim and issue preclusion."). As explained by Professor Mandelker: "federal judges have distorted the Supreme Court's ripeness precedents to achieve an undeserved and unwarranted result: they avoid the vast majority of takings cases on their merits." Testimony of Daniel Mandelker on H.R. 1534 Before the House Judiciary Committee, 31 Urb. Law. 232, 236 (1999).

Many other commentators have considered the lower court decisions applying *Williamson County* ripeness together with claim and issue preclusion and described the result as "worse than mere chaos," "inherently nonsensical," "shocking," "absurd," "unjust," "pernicious,", "riddled with obfuscation and inconsistency," and "a Kafkaesque maze." Berger, Michael and Kanner, Gideon, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 Urb. Law. 671, 702-703 (2004) (citations omitted). Berger and Kanner note that some of these commentators "are avowedly government-oriented in their views." *Id.* at 703. Even a commentator who believes that all federal takings claims should be forced into the state courts has described the situation as "a fraud or hoax on landowners." Roberts, Thomas, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 71 (1995).

In sum, the Ninth Circuit's rule effectively precludes consideration of the merits of federal takings claims in both state and federal court and leaves plaintiffs with nothing but state compensation claims in the state courts – and no opportunity at all for this Court to review the merits. The Ninth Circuit's rule cannot be squared with this Court's rationales in *Williamson County* and *England*; therefore, this Court should reverse the Ninth Circuit's decision and adopt the Second Circuit's holding in *Santini*.

III. CONTRARY TO THE CITY'S ARGUMENTS, THE NINTH CIRCUIT'S RULE IS NOT REQUIRED BY THE FULL FAITH AND CREDIT ACT

The City's only argument against the holding in *Santini* is that the Ninth Circuit's rule is compelled by the Full Faith and Credit Act, 28 U.S.C. § 1738. Respondent's Brief in Opposition ("Br. in Opp.") 13-18. That argument has no merit: The Second Circuit's holding in *Santini*, like this Court's holding in *England*, is fully consistent with the Full Faith and Credit Act.

The City's argument relies primarily on this Court's decisions in *Allen* and *Migra* interpreting the Full Faith and Credit Act. Br. in Opp. 13-14, 16. But, those decisions do not compel issue preclusion in this case; they only hold that there is no blanket exemption from issue and claim preclusion for suits brought under § 1983. *Allen v. McCurry*, 449 U.S. 90, 96-105 (1980) (issue preclusion); *Migra v. Warren City School District Board*, 465 U.S. 75, 83-85 (1984) (claim preclusion).

Indeed, this Court has already rejected the City's argument. *Allen* and *Migra* do not alter the res judicata

analysis here. In both opinions, this Court noted that federal law creates a number of exceptions to res judicata and discussed the exception created by *England*. *Migra*, 465 U.S. at 81 (federal law can modify the operation of § 1738) and 85 n. 7 (acknowledging exception created by *England*); *Allen*, 449 U.S. at 101 n. 17 (*England* exception not affected by Court's holding); accord *Haring v. Prosise*, 462 U.S. 306, 313-314 (1983) (recognizing various federal law exceptions to res judicata for state court judgments). As this Court stressed, the decisions in *Allen* and *Migra* have no effect on any exception to federal res judicata rules. *Allen*, at 95 n. 7 ("It must be emphasized that the question whether any exceptions or qualifications within the bounds of that doctrine might ultimately defeat a collateral estoppel defense in this case is not before us."); *Migra*, 465 U.S. at 85-87 (remanding to district court to determine whether Ohio claim preclusion barred that case).

Moreover, the City does not even begin to explain why there is an exception to the Full Faith and Credit Act for claim preclusion, but there should be no exception for issue preclusion. In this case, the City has consistently admitted that there is no claim preclusion. *San Remo III*, Pet. App. 12-a-13a; See also *DLX, Inc. v. Kentucky*, 381 F.3d 511, 521-523 (6th Cir. 2004) (every Circuit to decide issue has concluded that there is no claim preclusion because of *Williamson County*). The City has never offered any good reason to apply issue preclusion (but not claim preclusion) to federal takings claims. Of course, there is nothing in the Full Faith and Credit Act that would justify treating claim and issue preclusion differently. This Court made precisely that point in *Migra*:

> It is difficult to see how the policy concerns underlying § 1983 would justify a distinction between the issue preclusive and claim preclusive effects of state-court judgments.
>
> . . . . .
>
> If § 1983 created an exception to the general preclusive effect accorded to state-court judgments, such an exception would seem to require similar treatment of both issue and claim preclusion.

Migra, 465 U.S. at 83-84. If, as the City admits, and every Circuit to consider the issue has held, there is no claim preclusion in this circumstance, then there is also no reason to apply issue preclusion.

In sum, there is nothing in the Full Faith and Credit Act that supports the City's argument that issue preclusion should apply here even though claim preclusion does not.

IV. EVEN IF THIS COURT AGREES THAT ISSUE PRECLUSION SHOULD APPLY IN SOME TAKINGS CASES, THE NINTH CIRCUIT ERRED BY APPLYING ISSUE PRECLUSION IN THIS CASE

While the Ninth Circuit did discuss some California cases on issue preclusion, the Ninth Circuit held that issue preclusion applies if the state's compensation law is "equivalent" to the federal law of takings. *San Remo III*, Pet. App. 16a, citing *Dodd v. Hood River County*, 59 F.3d 852, 863 (9th Cir. 1995) ("*Dodd I*"); *Dodd v. Hood River County*, 136 F.3d 1219, 1225 (9th Cir. 1998) ("*Dodd II*"). In this case, the Ninth Circuit held that the Field Brothers' federal takings claims were barred because "the determination of the state takings claims was 'an equivalent determination' of the federal takings claims." *San Remo III*, Pet. App. 17a ("as required by *Dodd I*").

The Ninth Circuit's reliance on *Dodd I* and *Dodd II* was misplaced. Even if state law of issue preclusion were relevant in this case, the Ninth Circuit was required to give the California state court judgment the same preclusive effect as the state courts. *Allen*, 449 U.S. at 96. But, *Dodd I* and *Dodd II* could not have applied California law because the judgment at issue in *Dodd* was an Oregon judgment. And, both opinions state that they applied Oregon's law of issue preclusion. *Dodd I*, 59 F.3d at 861, *Dodd II*, 136 F.3d at 1225. Thus, even if *Dodd I* and *Dodd II* correctly applied the "equivalent determination" test, that test was based on Oregon law.[3]

California issue preclusion law, however, does not have an "equivalent determination" test. Instead, under California law, a judgment based on one body of law can never be given preclusive effect in a case governed by a different body of law. *American Continental Ins. Co. v. American Cas. Co.*, 86 Cal.App.4th 929, 103 Cal.Rptr.2d 632 (2001). The California Court of Appeal held that a decision under Arizona law (on identical facts between the same parties) was not binding in an action governed by California law:

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[3] In fact, the Ninth Circuit's opinions in *Dodd I* and *Dodd II* do not cite any Oregon case to support the "equivalent determination" test. In *Dodd I*, the Ninth Circuit cited no Oregon cases at all with respect to issue preclusion, instead citing solely to this Court's opinion in *Allen*. *Dodd I*, 59 F.3d at 863. In *Dodd II*, the Ninth Circuit never stated that the test was "equivalent determination". By making that the test, the Ninth Circuit effectively created its own federal common law of issue preclusion. Of course, that is completely improper under this Court's decisions. E.g., *Migra*, 465 U.S. at 87 (remanding with instructions to apply state law because it appeared that the district court may have applied federal law).

> [Plaintiff's collateral estoppel] argument fails because it has not established that the "same issue" was actually litigated and resolved in the prior litigation. The Arizona court reached its decision under Arizona law while we are asked to decide this case under California law.

American Continental, 86 Cal.App.4th at 945, 103 Cal.Rptr.2d at 643. Similarly, in this case, the state court decision denying compensation was based on California law, while this case is based on federal law. Just as a decision of the Arizona courts cannot dictate the result under California law, a decision by the California courts cannot dictate the result under federal constitutional law.[4]

Therefore, even if this Court rejects the Second Circuit's holding in *Santini*, the Ninth Circuit's decision is erroneous. Under California law, the state court judgment under state compensation law does not preclude the Field Brothers' federal action under the Fifth Amendment.

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[4] None of the California Supreme Court justices in this case believed that the court's ruling under state law would preclude the Field Brothers' federal claims. The majority stated that the Field Brothers "explicitly reserved their federal causes of action" and that because the Field Brothers relied "solely on state law, no federal question has been presented or decided in this case." *San Remo II*, Pet. App. 107a, n. 1. Both dissents made the same point. *San Remo II*, Pet. App. 170a (Baxter and Chin, dissenting: "Plaintiffs have reserved their federal claims and, if rebuffed here, will resume their federal litigation"); Pet. App. 194a (Brown, dissenting: "I dissent and hope the plaintiffs find a more receptive forum in the federal courts.").

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Courts of Appeals should be reversed.

Dated: January 24, 2005.

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